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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 491

TATKO BROTHERS SLATE CO., INC., *Petitioner*,

v.

MATTHEW HANNON, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

J. PRESTON SWECKER
923 Washington Building
Washington, D. C.
Attorney for Petitioner

Of Counsel:
WILLIAM C. SENNETT
Bennington, Vermont

MAXWELL E. SPARROW
665 Fifth Avenue
New York, New York

WILLIAM L. MATHIS
923 Washington Building
Washington 5, D. C.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Tatko Brothers Slate Co., Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on September 11, 1959, in the case there entitled "Tatko Brothers Slate Co., Inc., Plaintiff-Appellee v. Matthew Hannon, Defendant-Appellant, Docket No. 25244."

OPINIONS BELOW

The Statement of the Case, Findings of Fact, Conclusions of Law, and Judgment Order of the District Court are printed in the certified record and the nine copies of the printed record below filed herewith

(R. Vol. I, 18-30)* and are reported at 157 F. Supp. 277. The Opinion and Judgment of the Court of Appeals are printed in the Appendix hereto (A. 1a) and reported at .... F.2d ....

JURISDICTION

The judgment of the Court of Appeals was entered on September 11, 1959 (R. Vol. II, 121a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

THE QUESTIONS PRESENTED

1. Did the Court of Appeals apply the correct Rule of Law, consistent with U.S. Code, Title 35, § 103, in holding that the Tatko pallet, covered by the patent in suit, was an "obvious" innovation to those skilled in the art?

2. Where the District Court had found, based on substantial evidence, not questioned by the Court of Appeals, that there was demand for the invention covered by the patent in suit, that it filled a long-felt want, and that the trade generally adopted the invention when it was produced by the patentee, was the Court of Appeals justified in disregarding these findings of fact, and the criteria therein determined, and in holding that the patent in suit was lacking in patentable invention?

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* Record citations will be in the following form:

(R. Vol. I, 1)—page 1 of the certified record and of the printed record below

(A. 1a)—page 1a of the Appendix to this petition and bound with it.

STATUTE INVOLVED

U. S. Code, Title 35:

§ 103:

"A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been *obvious* at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made."

§ 282:

"A patent shall be presumed valid. The burden of establishing invalidity of a patent shall rest on a party asserting it." (Italics ours)

STATEMENT OF THE CASE

This action was filed in the District Court as a suit for patent infringement, under Title 35, U.S. Code, § 281. Jurisdiction was based on Title 28, U.S. Code, § 1338(a).

Prior to the invention of the patent in suit, the slate industry, including the Petitioner, had loaded and unloaded slate and flagstone by hand onto and off trucks, railway cars and the like. This hand operation was slow and laborious, requiring the piece-by-piece handling of slate and flagstone.

As early as 1946, the Petitioner began attempts to use pallets of the type then available for the handling of slate and flagstone, but the only pallets that could be obtained required that the slate be laid flatwise on the

surface of the pallets. These were flush-type pallets, with no satisfactory means of confining the slate on the surface. They could not be used for transporting flagstone any appreciable distance over the highway. Several witnesses recounted unsatisfactory experiences with pallets included in such attempts.

Between 1946 and 1954, when this patented pallet was introduced to the trade, various attempts were made, according to the evidence before the District Court, to solve the problem thus presented, none successfully. This invention was described by the patentee as coming to him in a flash after it had been sought for many years.

The concept involved providing pockets in the top surface of the pallet, but more than that, it required that the pockets be formed in a particular way, extending transversely between spaced stringers, a new concept in the art, so as to receive flat slabs of slate standing on edge therein to form end-supports for the pallet. Those flat slabs of slate and flagstone, towed into these pockets, receive, confine and wedge therebetween the slate or flagstone stacked edgewise on the top surface. This was tried and found to solve the problem effectively.

Experienced operators in the industry, and large manufacturers, had tried various means of holding slate in place on a pallet (see Finding of Fact 13, R. Vol. I, 22). None of these went into extensive commercial use. However, when Petitioner introduced this pallet to the trade, substantially the entire slate and flagstone industry adopted it. The Tatko pallet has, to a substantial extent, replaced the hand operations theretofore in universal use.

As characterized by the District Court:

> "* * * The Tatko pallet made a very substantial contribution to the art of handling and transporting flagstone and other slate products." (R. Vol. I, 22)

The application for the Tatko patent was filed on March 3, 1954, and the patent was issued on November 9, 1954, No. 2,693,926 (R. Vol. I, 53).

The only prior patent (Lilienfeld, No. 2,471,693) referred to by the Court of Appeals as a basis for holding the Tatko patent invalid, had been considered and rejected by the experienced Examiner in the Patent Office.

The pallet is like a platform, formed of wood or the like, designed to permit goods to be placed thereon, to be raised and lowered and transported from place to place by a fork lift truck. This pallet differs from others theretofore in use in that it has two stringers at each opposite end of the pallet, indicated at 12 and 14 and at 11 and 13 in Fig. 1, and that some of the boards 20 extend only between the innermost stringers while others of the boards, indicated at 18, extend throughout the length of the pallet. This arrangement provides transversely extending pockets, indicated at 22, which are open at the top, but closed at the bottom. They are also of sufficient length to receive flat slabs of slate standing on edge therein to form end supports. These serve to confine and wedge therebetween the slabs of slate that are arranged on edge, side-by-side, on the top surface of the pallet. These slabs are thereby towed in place, and form a rigid unit. (See Finding of Fact 12 (R. Vol. I, 21)).

Not only were these characteristics of the pallet essential, but the pockets must be closed at their outer

ends, to keep these towed-in slabs from falling out, and to keep the entire rigid unit from falling apart.

Those features of the Tatko pallet which distinguish it from the prior art and account for its greater utility in the slate industry, are accurately and simply recited in the claims of the patent, for example in Claim 3 (R. Vol. I, 56):

> "3. In a pallet, the combination of a pair of stringers at each opposite end of the pallet and with the stringers of each pair spaced apart transversely forming pockets therebetween and with each of said stringers extending throughout the width of the pallet, boards secured on opposite sides of the stringers connecting the pairs of stringers together and also the stringers of each pair; said boards at the opposite ends of the pockets closing said ends of the pockets, additional boards at the top of the pallet extending only between the inner stringers of the respective pairs and intermediate the first-mentioned boards, and boards secured to the bottoms of the stringers intermediate the first-mentioned boards substantially closing the bottoms of the pockets."

The District Court found that invention was involved in the Tatko pallet, and that the patent was good and valid.

The Court of Appeals brushed aside all of the many findings of fact of the District Court on which that Court's decision was predicated and, on the basis of only one of the prior patents in the record, held that the Tatko invention was obvious to a person having ordinary skill in the slate industry.

In a strong dissenting opinion, Judge Madden, of the United States Court of Claims, sitting by designa-

tion, pointed out that the case was decided, not on the basis provided by precedent and recent statute, of obviousness to those in the industry, but of obviousness to the judges after the patent has disclosed the device and the industry has adopted it. This was contrary to the intent of § 103 of Title 35, United States Code, enacted in 1952.

REASONS FOR GRANTING THE WRIT

1. There is doubt and confusion of both the Bench and the Bar as to the standard of invention applicable in patent cases today. This is an important matter of national consequence upon which this Court should now unequivocally rule

This Court has not accepted for review any case rising under the Patent Act of 1952.* In fact, the last opinion which this Court delivered upon the all important question of patentability, was in its much discussed decision of *A. & P. Tea Co.* v. *Supermarket Corp.*, 340 U.S. 147 (1950). It is not surprising that in this long interval of silence, the longest on this point in the post-Civil War history of this Court, divergent views have been expressed in the decisions of the lower Federal Courts** and in legal treatises*** about the requisites for patentability in the United States.

That the complete reenactment and revision of the patent laws of the United States into a systematized Title of the U. S. Code, would inevitably give rise to

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* Title 35 U.S. Code.

** For example, compare the decision of Judge Learned Hand in Lyon v. Bausch & Lomb Optical Co. (C.A. 2) 224 F. (2d) 530, with that of Judge Modarelli in Avery v. Ever Ready Label Corp., 104 F. Supp. 913 (D.N.J. 1952).

*** For example, see Harris, Some Aspects of the Underlying Legislative Intents of the Patent Act of 1952, 23 Geo. Wash. L. Rev. 658 (1955).

some problems of interpretation is not surprising. This circumstance alone, as exemplified by Judge Madden's dissenting opinion in the present case (A. 6a), is a sufficient reason for this Court to grant the writ sought.

Petitioner also respectfully suggests that regardless of the effect of the Congressional action in revising and codifying the patent statutes, the last decisions of this Court on the question of patentability have proved to be, themselves, a source of doctrinal confusion.

2. The decision of the Court of Appeals is in conflict with the decision in the First Circuit, which held the Tatko patent good and valid at law

While the latter decision was rendered by the District Court in Maine (A. 9a), and no appeal was had from the decision by the defendant therein, it stands as the rule of law in that portion of the First Circuit.

Thus, we see that of the five Judges who have passed on the *evidence* presented with respect to the question of obviousness and invention of this Tatko patent in suit, three of those Judges (Gibson and Gignoux, of the District Courts of Vermont and Maine, and Madden of the United States Court of Claims) have held that the Tatko patent is good and valid at law and should be sustained. Only the two Judges of the Court of Appeals who supported the majority opinion, held contra, based on what we believe to be a disregard of the intent of Congress in amending the patent law in its recodification, and failure to follow applicable decisions of this Court.

3. There is small chance of obtaining a conflict of decision in other circuits because of the concentration of the slate industry in the Second Circuit

Most of the slate and flagstone industry in the United States is concentrated in New York and Vermont, both of which States are in the Second Circuit. When a suit was filed against a user, in the First Circuit (see Reason 2, supra), no appeal was filed from the judgment of the District Court sustaining the validity of the patent.

This Court has repeatedly recognized that where the major portion of an industry is confined to one circuit, and where the patent has been largely adopted by an entire industry, as the District Court found here, this circumstance may justify review by this Court on certiorari, even in the absence of a conflict of decision as between different circuits.

Schriber-Schroth Co. v. *Cleveland Trust Co.*, 305 U.S. 47

Mackay Radio & Telegraph Co., Inc. v. *Radio Corp. of America*, 306 U.S. 86

Exhibit Supply Co. v. *Ace Patents Corp.*, 315 U.S. 126

Mansey Gear Works, Inc. v. *Outboard; Marine & Mfg. Co.*, 315 U.S. 759

4. The decision of the Court of Appeals is in conflict with the decisions in other circuits as to the meaning of obviousness in Section 103 of Title 35, U.S. Code, as enacted in 1952

In *L-O-F Glass Fibers Co.* v. *Watson*, 228 F. (2d) 40, the Court of Appeals for the District of Columbia Circuit affirmatively held that Section 103 of the 1952 Act was a definite restoring of the definition of invention to the rule earlier prevailing prior to the adoption of this Act, and sustained the claim of patent rights based thereon.

In *R. M. Palmer Co.* v. *Ludens, Inc.*, 236 F. (2d) 496, the Court of Appeals for the Third Circuit affirmatively held that Section 103 of the 1952 Patent Act changed the direction of the meaning of obviousness, and imported a new "mood", as expressed by Judge Madden in his dissenting opinion in this case.

In *Otto* v. *Koppers Co.*, 246 F. (2d) 789, the Court of Appeals for the Fourth Circuit held that the factors found by the District Court in this case overcame the defense of obviousness, and were sufficient to sustain the validity of the patent in suit.

The rule of law of the Court of Appeals below cannot be reconciled with the rule prevailing in these other Circuits. The criteria for determining obviousness and invention, as adopted in these other Circuits, have been brushed aside and disregarded by the Court of Appeals below.

These are only a few of the cases in other Courts that have interpreted Section 103 of the 1952 Act, but they support, as the majority rule of the Courts, the new "mood" of this Act with respect to the meaning of obviousness therein, as forcefully expounded by Judge Madden in his dissenting opinion.

The proper interpretation of the Statute, and the rule applicable to this situation, should be finally determined by this Court.

5. The decision of the Court of Appeals is in conflict with decisions of this Court

In *Goodyear Tire and Rubber Co., Inc.* v. *Ray-O-Vac Company*, 321 U.S. 275, this court noted that especially with respect to a simple device, a showing of long-felt

want, attempts of others to solve the problem without success, etc., were factors to be considered:

> ". . . These factors were entitled to weight in determining whether the improvement amounted to invention and should, in a close case, tip the scales in favor of patentability."

This was the last of a long line of cases in this Court to the same effect. See Footnote 5.

These factors were, indeed, the basis for the decision of the District Court. They were completely disregarded by the Court of Appeals which arrived at a contrary decision based on a determination of evidence, on one point only. Its attempt to distinguish the rule is without support in the record.

The Court of Appeals relied upon decisions of this Court in *Great Atlantic & Pacific Tea Co.* v. *Supermarket Equipment Corp.*, 340 U.S. 147 (1950) and *Jungersen* v. *Ostby & Barton Co.*, 335 U.S. 560 (1949). Both of these cases were decided prior to the enactment of the 1952 Patent Act.

Whether those decisions are controlling since the enactment of the Patent Act is a question which the Court should now determine. The conflicting views have led to much confusion.

The Court of Appeals brushed aside the findings of fact of the District Court as to whether the device was obvious to a person having ordinary skill in the art, relying upon this Court's decision in *Great Atlantic & Pacific Tea Co.* v. *Supermarket Equipment Corp.*, *supra*. In that case, this Court pointed out clearly:

> ". . . The questions of general importance considered here are not contingent upon resolving con-

> flicting testimony, for the facts are little in dispute. We set aside no findings of fact as to invention, for none has been made."

The clear language of § 103 of the 1952 Patent Act requires the determination of fact issues in deciding whether,

> ". . . the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art."

This is the new "mood" of the Patent Law, as expressed by Judge Madden, before the Court may reach the question of patentability.

The Court below has disregarded, or misinterpreted, the language of the Statute, and this should be corrected.

CONCLUSION

It is submitted that this petition should be granted for the several reasons given above.

Respectfully submitted,

J. PRESTON SWECKER
Attorney for Petitioner
923 Washington Building
Washington, D. C.

Of Counsel:

WILLIAM C. SENNETT
Bennington, Vermont

MAXWELL E. SPARROW
665 Fifth Avenue
New York, New York

WILLIAM L. MATHIS
923 Washington Building
Washington 5, D. C.

October 19, 1959

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 142—October Term, 1958.

(Argued February 6, 1959 Decided September 11, 1959.)

Docket No. 25244

TATKO BROS. SLATE CO., INC., *Plaintiff-Appellee*,

v.

MATTHEW HANNON, *Defendant-Appellant*.

Before:

CLARK, *Chief Judge*, MADDEN, *Judge*, United States Court of Claims,* and HINCKS, *Circuit Judge*.

Suit for infringement of Tatko Patent No. 2,693,926, and counterclaim for a declaration that the patent is invalid. The District Court for the District of Vermont, Ernest W. Gibson, *Judge*, held that the patent was valid and infringed. 157 F. Supp. 277. From this judgment, the defendant appeals. *Reversed*.

HINCKS, *Circuit Judge*:

The patent in suit, Tatko Patent No. 2,693,926, is now before us for the second time. Upon the first occasion, a suit for a declaratory judgment was brought in the District Court for the Northern District of New York by

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* Sitting by designation pursuant to the provisions of 28 U. S. C. § 291(a).

the Vermont Structural Slate Company against Tatko Brothers Slate Company, holder of the patent (hereinafter "Tatko"). That suit resulted in a summary judgment in the plaintiff's favor, Judge Foley holding that no genuine issue of a material fact was presented. *Vermont Structural Slate Co., Inc.* v. *Tatko Bros. Slate Co., Inc.*, 134 F. Supp. 4. We affirmed, 233 F. 2d 9, cert. denied 352 U. S. 917.[1] Meanwhile, before the district court decision in that case had been made, Tatko brought this suit in the Vermont District Court, claiming infringement of the same patent. While this case was awaiting trial, our decision in the *Vermont Structural Slate* case was filed. After a four day trial, Judge Gibson concluded that the Tatko patent was valid and infringed; he granted judgment for the plaintiff and dismissed the defendant's counterclaim. 157 F. Supp. 277.[2] This appeal followed.

In the present case there was no privity between the defendant and the Vermont Structural Slate Company, the party who had challenged the validity of the Tatko patent in the Northern District of New York. Consequently, Judge Gibson was right in ruling that our earlier decision in that case is not *res judicata* and may not be pleaded as a bar to this suit. *Triplett* v. *Lowell*, 297 U. S. 638; *Gold Seal Importers, Inc.* v. *Westerman-Rosenberg, Inc.*, 2 Cir., 133 F. 2d 192. Indeed, that ruling is not now questioned.

Accordingly, we turn at once to consider Judge Gibson's holding that the Tatko patent is valid. In this task, the scope of review is clearly defined by the decided cases: primary, or evidenciary, findings of fact may not be disturbed unless clearly erroneous; but the inferences and

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[1] The decision relating to the permanent injunction and final decree in this case is reported at 149 F. Supp. 139, affirmed 253 F. 2d 29.

[2] Prior to trial of the case in Vermont, the defendant's motion for a summary judgment had been denied. 147 F. Supp. 865. This ruling is not assigned as error in the present appeal.

conclusions, based upon the primary facts, upon which depends the ultimate findings of patentability, as well as the standard of invention applied below, are questions of law fully reviewable in this court. *Great Atlantic & Pacific Tea Co.* v. *Supermarket Equipment Corp.*, 340 U. S. 147; *Blish, Mize and Silliman Hardware Co.* v. *Time Saver Tools, Inc.*, 10 Cir., 236 F. 2d 913, cert. denied 352 U. S. 1004. We scrutinize the conclusion of patentability in this case with especial care, since four judges of this court heretofore, albeit acting upon a somewhat different record of fact, have agreed that the alleged invention is obvious and unpatentable.

The patent itself, issued on November 9, 1954 upon an application filed March 2, 1954, need only be briefly described since it has been fully set forth in earlier opinions, cited above. The alleged invention is stated to relate to improvements in pallets in general and more particularly to the type employed for the handling of slate and flagstone. It consists of a two-decked platform (in practice it is usually about four feet square) with the parallel platforms separated by the height of the transverse stringers. The arrangement is such that loads may be stacked upon the upper of the two decks and the forks of a fork-lift truck may be inserted into the space between the decks (usually a space of about four inches). Thus with the aid of a fork-lift truck the pallet and its entire load may be raised and moved, say, to a truck, railroad car, or a warehouse thus saving the necessity of loading and unloading the load-pieces by hand every time a load is moved. But the gist of Tatko's alleged invention lay in slots or pockets along the two opposite sides, each between a pair of the stringers which spaced the two platforms from each other. These slots were formed simply by terminating the upper platform on its opposite sides at the inside stringer of the terminal pair so that pieces of slate or flagstone could be inserted edgewise between the terminal stringers on both sides coming to rest upon the floor of the lower platform.

Thus the edgewise pieces of slate, etc., served as side walls between which the load, with its pieces also generally on edge, could be wedged in.

In the prior art, Lilienfeld, No. 2,471,693 (1949),[3] had disclosed a pallet comprised of a pair of spaced platforms and the arrangement was such that the intervening space was suitable for the insertion of the forks of a fork-lift truck. And to hold the load in place Lilienfeld had disclosed four hinged arms, two on each of the opposite sides, which could be raised to a position perpendicular to the surface to keep the load from sliding off at the sides.

We assume that in this case no prior art pallet was shown with terminal slots which could be used for the insertion, by hand, of side walls. The central problem of the case may thus be framed: Did it involve patentable invention to substitute in a pallet for Lilienfeld's hand operated hinged side arms Tatko's slots for the manual insertion of slate side walls as a means to hold the load in place?

The affirmative answer to this question made below was based in turn upon another conclusion, viz., that the addition of Tatko's slots to the conventional two-tier pallet "called for more than was obvious to a person having ordinary skill in the slate industry."[4] And the latter conclusion was apparently based on a finding that "for a considerable length of time people skilled in the trade worked to devise an effective pallet for the purpose of easily and safely handling flagstone and slate, but this innovation [i.e., the *slotted* pallet] escaped them." But this finding, we think, was an insufficient basis for a conclusion as to what

[3] This patent had been cited as a prior art patent in the appellant's answer.

[4] Quotation from Conclusion of Law No. 3. The Tatko patent specifies that its invention "relates to improvements in pallets in general and more particularly to the type employed in the slate products industry."

was *obvious* in the industry. For the patentee himself testified, as the court below found, that he conceived the slotted pallet in June 1951; and that he concealed his invention until January 1954; because until that time the building supply industry was insufficiently supplied with fork-lift trucks [upon which the utility of pallets largely depended] to make it desirable to palletize the industry and until then "the demand for palletized slate * * * was very limited." But of course when the demand for palletized slate was "very limited," one could not expect an effort by the industry generally to develop improved pallets. Thus the fact that the slotted pallet "escaped" the attention of the industry signifies only that that notion was impractical because the consuming public was not equipped with fork-lift trucks—not that the slotted pallet was more than an obvious solution once the public was sufficiently equipped with such trucks. And the fact that an occasional individual in the pre-palletized industry may have sought to improve pallets for the handling of slate without hitting on the notion of the slotted pallet no more demonstrates that the notion was non-obvious than Mr. Tatko's achievement demonstrates that the notion was obvious. Thus Tatko's testimony leaves no room for a contention that his "invention" was one to fill a long-felt want which others had long and unsuccessfully sought to fill; the want was not felt until the prevalence of the fork-lift trucks and then was promptly filled. *Welsh Manufacturing Co.* v. *Sunware Products Co.*, 2 Cir., 225 F. 2d 225. In view of this testimony, our holdings in cases such as *Lyon* v. *Bausch & Lomb Optical Co.*, 224 F. 2d 530, are inapplicable.

We think the mere exhibition of Tatko's patent, with its simple arrangement of planks and stringers, was evidence enough that the disclosure was one not beyond the skill of an ordinary mechanic in the art. Certainly it required nothing beyond the visual observation of slate joggling off flush pallets to appreciate the desirability of some side-wall device to hold the intervening load in place. Whether pro-

vision for such side walls should be made by hinged uprights, as in Lilienfeld, or by uprights nailed or otherwise permanently fixed to the stringers, or by removable stakes such as those long and commonly observed for insertion in the slots or sockets in the platforms of open body trucks, or by slots in the upper platform for the receipt of upright pieces of slate, as Tatko suggested, was a mere matter of choice between simple devices in common use in well-nigh every art and trade. To make such a simple choice and to embody it in the pallet, called for no skill beyond that of an ordinary mechanic in the slate-pallet art. We think it altogether plain that the patent in suit was lacking in patentable invention. *Great Atlantic & Pacific Tea Co.* v. *Supermarket Equipment Corp., supra; Jungersen* v. *Ostby & Barton Co.*, 335 U. S. 560; *Bostitch, Inc.* v. *Precision Staples Corp.*, 2 Cir., 178 F. 2d 332; *Zoomar, Inc.* v. *Paillard Products*, 2 Cir., 258 F. 2d 527, cert. denied 358 U. S. 908.

For these reasons, the plaintiff's complaint must be dismissed and the defendant's counterclaim granted.

Reversed.

MADDEN, *Judge* (dissenting):

The Court rightly concludes, as did Judge Gibson in the District Court, that the prior decision involving this same patent, and holding it invalid, *Vermont Structural Slate Co.* v. *Tatko Bros. Slate Co.*, 134 F. 4, affirmed by this Court, 233 F. 2d 9, is not a bar to the plaintiff's suit. The instant case being, then, open for normal appellate treatment, has not, I think, received such treatment at the hands of the Court. A crucial finding of fact of the District Judge has, it seems to me, been without justification, discarded.

Judge Gibson found, as the Court recites, that "for a considerable length of time people skilled in the trade worked to devise an effective pallet for the purpose of easily and safely handling flagstone and slate, but this inno-

vation [i.e. the *slotted* pallet] escaped them." The Court says that this does not prove that the innovation was not *obvious* in the industry because, at the time, not many enterprises in the building supply industry were equipped with fork-lift trucks, and, therefore there was not much call for double-floored pallets. But Judge Gibson found that there were several enterprises of considerable size which faced the problem, attempted in various ways to solve it, did not find a satisfactory solution, and immediately copied the plaintiff's solution when it became public.

The philosophy of the instant decision, as I see it, is the same as that of the District Court and this Court in the *Vermont Structural Slate Co.* case, *supra*, i.e. that the plaintiff's device is so simple and obvious that it does not rise to the dignity of an invention. Some of the language of Judge Foley in the *Vermont Structural* case is revealing as to why he reached that conclusion. He wrote, 134 F. Supp. at p. 5.

> The patent involved in this motion and lawsuit is one of unbelievable simplicity. This statement finds the most support in the fact that I was able to comprehend with some ease the nature, purpose and function of its design from a reading of the patent, the descriptions in the pleadings and affidavits, an inspection of the photographs and a view of the physical exhibits that were demonstrated by the defendant upon the argument of the motion. * * *

And in this Court, the late Judge Jerome Frank wrote that invention was plainly lacking, the question of invention "was not at all close" and "The patent disclosed no more ingenuity than that of a man skilled in the art."

For the judges, after the plaintiff's device had been disclosed, and had been quite universally adopted in the industry, it was obvious that that was the way to solve the difficulty. Why then did the people in the industry submit,

even though only a few of them directly faced the problem, and even though only a few years elapsed before the plaintiff's solution was disclosed and immediately adopted, to the bedevilment of having their loads slip off the pallets and be scattered on the highway, to having their cumbersome sideboards use up unnecessary space in returning the pallets to the quarries, to having their loose stakes get broken and lost?

The case seems to me to be getting itself decided, not on the basis provided by precedent and recent statute, of obviousness to those in the industry, but of oviousness to the judges after the patent has disclosed the device and the industry has adopted it. This seems to me to be a failure by the Court to adjust itself to the purpose and spirit, the "mood," see *Universal Camera Corp.* v. *Labor Board*, 340 U. S. 474, 487, of Section 103 of Title 35, United States Code, enacted in 1952.

The patent here in question was not a great patent. It required no Franklin, Faraday, Edison, or Marconi to conceive it. But the device was highly useful, it was admittedly new, and on its modest level, it was, I venture to say for myself, ingenious. I think it was worthy of a valid patent, which the courts should protect.

APPENDIX B

Order

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE
SOUTHERN DIVISION

Civil No. 4-191

TATKO BROS. SLATE CO., INC.

v.

LAWRENCE C. ANDREW, d b a L. C. ANDREW

Upon the Amended Complaint filed in open court on August 11, 1958; upon defendant's subsequent default that day in open court; upon the waiver of notice of application for default judgment, which waiver has been duly filed; and upon consideration of testimony, depositions and demonstrations made to this Court, ex parte, the Court finds as follows:

1. That this Court has jurisdiction of the parties and the subject matter of this action.

2. That plaintiff is the owner of Letters Patent No. 2,693,826.

3. That said Letters Patent are good and valid at law.

4. That defendant has infringed said patent by making, using and selling pallets of the structure shown on the photographs annexed thereto marked "Exhibits A-1, A-2 and A-3."

Order

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that defendant, his agents, servants, employees, and attorneys, and those persons in active concert or participation with them who receive actual notice of this decree, by personal service or otherwise, be and they hereby are enjoined from making, using or selling pallets of the structure shown in said Exhibits A-1, A-2 and A-3, or colorable variations thereof, or from otherwise infringing said Letters Patent, except as authorized by or through plaintiff, or by a Court having proper jurisdiction thereof.

IT IS FURTHER ORDERED that jurisdiction of the above-entitled matter be retained by this Court for the purpose of conducting such further hearings as this Court may deem advisable for the purpose of determining damages, costs and liability for and amount of attorneys fees which may be awarded under the provisions of Title 35, United States Code, Section 365, and for the entry of Final Judgment herein.

EDWARD T. GIGNOUX
Judge, United States District Court for the District of Maine

Dated: August 12, 1958

A true copy.

Attest:

MORRIS COX, *Clerk.*

FILE COPY

Supreme Court, U.S.
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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1959

No. 191

PATRO BROTHERS SLATE CO., INC., PETITIONER,

v.

MATTHEW HANNON, RESPONDENT.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

JOHN C. BLAIR
One Atlantic Street
Stamford, Connecticut
Attorney for Respondent

Of Counsel:

BLAIR SPENCER & BUCKLEY
ROBERT H. WARE
ROBERT A. CESARI
F. EUGENE DAVIS IV
One Atlantic Street
Stamford, Connecticut

J. MALCOLM WILLIAMS
Poultney, Vermont.

November 19, 1959

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IN THE

Supreme Court of the United States

October Term, 1959

No. 491

TATKO BROTHERS SLATE CO., INC., PETITIONER,

v.

MATTHEW HANNON, RESPONDENT.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Proceedings Below

Petitioner seeks a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit, filed September 11, 1959, ___ F. 2d ___, 122 U. S. P. Q. 585, reversing the decision of the United States District Court for the District of Vermont, 157 F. Supp. 277.

Question Presented

Should this Court review an ordinary patent case in which the "unobviousness" of the asserted "invention" depends solely on "long-felt want", when the Court of Appeals concluded that "long-felt want" did not exist in view of the District Court's findings?

* * * * *

The crux of the Court of Appeals' holding relevant to this question is found in the following language, 122 U. S. P. Q. at pages 586-587:

> "For the patentee himself testified, as the court below found, that he conceived the slotted pallet in June 1951; and that he concealed his invention until January 1954; because until that time the building supply industry was insufficiently supplied with fork-lift trucks [upon which the utility of pallets largely depended] to make it desirable to palletize the industry and until then 'the demand for palletized slate * * * was very limited'. But of course when the demand for palletized slate was 'very limited', one could not expect an effort by the industry generally to develop improved pallets. * * * Thus Tatko's testimony leaves no room for a contention that his 'invention' was one to fill a long-felt want which others had long and unsuccessfully sought to fill: the want was not felt until the prevalence of the fork-lift trucks and then was promptly filled."

Background of the Litigation

In March, 1955, the Vermont Structural Slate Company petitioned for a declaratory judgment in the Northern District of New York against Tatko Brothers Slate Co., Inc., Petitioner here, praying that the patent here in suit be declared invalid. Vermont Structural moved for summary judgment declaring the patent invalid for failure to disclose more than an "obvious" step forward in a crowded art. Judge Foley granted the motion and held the patent invalid for lack of invention,* saying:

> "As the plaintiff urges, the most the inventor seems to have here is a 'good idea', a workmanlike

* *Vermont Structural Slate Co., Inc.* v. *Tatko Brothers Slate Co., Inc.*, 134 F. Supp. 4, 107 U. S. P. Q. 86 (N. D. N. Y. 1955).

rearrangement of old elements that enhanced utility without invention beyond the prior art." (134 F. Supp. at p. 6)

In affirming Judge Foley's decision (233 F. 2d 9), the Court of Appeals for the Second Circuit had this to say about the alleged invention of the patent here in suit:

"Nor did it require expert testimony to make it plain that the differences between the prior art and the patent claims were *obvious* to persons having ordinary skill in the trade at the time the alleged invention was made.

* * * * *

"If the question of patentable invention were a 'close one', the facts here thus taken as true might tip 'the scales of judgment' in defendant's favor; but where 'invention is plainly lacking', such a fact 'cannot fill the void'. *Jungersen* v. *Ostby & Barton Co.*, 335 U. S. 560, 567. We agree with the judge that here the question of invention was not at all close. The patent disclosed no more ingenuity than that of a man skilled in the art." (233 F. 2d at pp. 10-11; emphasis added)

On July 6, 1956, Tatko Brothers filed an infringement suit in the District of Maine against L. C. Andrew, a flagstone customer of Vermont Structural. Because of the small amount involved, Andrew voluntarily defaulted *prior to trial*, and an *ex parte* default judgment for $378.76 was entered by the District Court in October, 1958.

The complaint in the present case against Respondent, Matthew Hannon, a small independent Vermont slate broker, was filed in the District of Vermont on May 13, 1955. In September, 1956, after the Court

of Appeals for the Second Circuit had affirmed Judge Foley's decision, the Vermont District Court denied Hannon's motion for summary judgment, and after a trial, held the patent valid and infringed, basing its holding of validity upon a conclusion that the patent had filled a long-felt need. The Court of Appeals for the Second Circuit reversed this holding, *supra*, p. 1, concluding that the evidentiary facts found by the Vermont District Court did not support that Court's conclusion that a long-felt need had existed. In holding that this conclusion was reviewable on appeal, the Court stated:

> "Accordingly, we turn at once to consider Judge Gibson's holding that the Tatko patent is valid. In this task, the scope of review is clearly defined by the decided cases: primary, or evidentiary, findings of fact may not be disturbed unless clearly erroneous; but the inferences and conclusions, based upon the primary facts, upon which depends the ultimate findings of patentability, as well as the standard of invention applied below, are questions of law fully reviewable in this court. Great Atlantic & Pacific Tea Co. v. Supermarket Equipment Corp. 340 U. S. 147, 87 USPQ 303; Blish, Mize and Silliman Hardware Co. v. Time Saver Tools, Inc., 10 Cir., 236 F. 2d 913, 111 USPQ 6, cert. denied 352 U. S. 1004, 112 USPQ 494. We scrutinize the conclusion of patentability in this case with especial care, since four judges* of this court heretofore, albeit acting upon a somewhat different record of fact, have agreed that the alleged invention is obvious and unpatentable."
> F. 2d , 122 U. S. P. Q. at 586.

* Petitioner at page 8 erroneously asserts that three judges have held this patent valid. The fact is that after *inter partes* consideration, *six* judges (Judges Foley, Frank, Medina, Waterman, Clark, and Hincks) held the patent invalid, and only two (Judges Madden and Gibson) believed it valid.

PETITIONER'S REASONS FOR SEEKING CERTIORARI ARE UNFOUNDED

Petitioner asserts five reasons in support of its request for certiorari, but none of these reasons justifies review by this Court. Taking the Petitioner's reasons in order:

1. This case presents no question of interpretation of the Patent Act of 1952 requiring this Court's consideration, since the Tatko patent is invalid under any conceivable standard of invention.

In the *Vermont Structural* case, *supra*, p. 3, the Court of Appeals for the Second Circuit said:

> "Plaintiff argues that the recent amendment to the patent statute, 35 U. S. C. Section 103, lowered the standard of invention, citing Lyon v. Bausch & Lomb Optical Co., 224 F. 2d 530, 535-536, 106 USPQ 1, 6-7 (C. A. 2). *Even so, the plaintiff's patent, we think, is clearly sub-standard.*" (233 F. 2d at p. 11; emphasis added)

The same Court decided below that the District Court's conclusion as to long-felt need was not supported by the evidence before it. The Court of Appeals held that such conclusion was the sole basis for the District Court's holding of patentability, and that this conclusion was an ultimate finding, reviewable on appeal (*supra*, page 4). This is well-settled law, as stated, for example, in *Noble* v. *C. S. Johnson Co.*, 241 F. 2d 469, 475, 112 U. S. P. Q. 350, 354-355 (7th Cir. 1957):

> "On a trial of a patent case without a jury, the district court has the initial duty of determining the evidentiary facts . . .

> "The next step is a finding by the district court of the ultimate facts, such as invention and anticipation . . . it has been held that the court, in making such finding, is required to apply the correct criteria of law to the evidentiary facts, and whether it has done so is reviewable on appeal as a matter of law . . .
>
> "When the district court has thus found the ultimate facts, it is then its duty to decide, as a matter of law, the overall question of validity which, of course, is likewise subject to review."

See also:

Glitsch & Sons v. *Wyatt*, 224 F. 2d 331, 335, 106 U. S. P. Q. 162, 165 (5th Cir. 1955)

Hobbs v. *Wisconsin Power & Light Co.*, 250 F. 2d 100, 103, 115 U. S. P. Q. 371, 373 (7th Cir. 1957), cert. denied, 356 U. S. 932 (1958)

National Slug Rejectors, Inc. v. *A. B. T. Mfg. Co.*, 164 F. 2d 333, 336, 75 U. S. P. Q. 151, 154 (7th Cir. 1947), cert. denied, 333 U. S. 832 (1948)

Blish, Mize and Silliman Hardware Co. v. *Time Saver Tools, Inc.*, 236 F. 2d 913, 916, 111 U. S. P. Q. 6, 9 (10th Cir. 1956), cert. denied, 352 U. S. 1004 (1957)

Petitioner's attempt to convert a plain run-of-the-mill patent case into an "important matter of national consequence", particularly on the ground that "the last decisions of this Court" on patentability are "a source of doctrinal confusion" is rather farcical and inappropriate.

2. The default judgment in the District Court of Maine was not a "decision" in conflict with the decision of the Court below.

Andrew accepted an adverse default judgment in Maine because of the small damages involved, $378.75. Judge Gignoux's order in the *Andrew* case made the *ex parte* nature of its disposal abundantly clear:

> "Upon the Amended Complaint filed in open court on August 11, 1958; upon defendant's subsequent default that day in open court; upon the waiver of notice of application for default judgment, which waiver has been duly filed; and upon consideration of testimony, depositions and demonstrations made to this Court, ex parte, the Court finds as follows: . . ." (Petition, Appendix B)

Such a non-adversary default judgment does not create a "real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeal", as required by this Court in *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U. S. 387, 393 (1923). The District Court's *ex parte* order cannot possibly be the law of the First Circuit, whose Court of Appeals has never considered any aspect of this litigation.

3. The facts do not support Petitioner's contention that a conflict between the circuits is unlikely.

A substantial segment of the slate-quarrying industry is located in the Third Judicial Circuit, and one infringement suit based on this patent has already been filed and settled therein. *Vatko Brothers Slate Co., Inc.* v. *Bergen Blaustone Co., Inc.*, D. C. N. J. Newark Doc. 490-55, settled and dismissed March 23, 1956, 706 Pat. Off. Official Gazette 5 (May 1, 1956).

As a matter of fact, in the present case the Petitioner took the depositions of five slate quarrymen (R. Vol. I, pp. 88-99), all doing business in Pennsylvania and using pallets in the shipment of slate.

Indeed, slate and flagstone are shipped and sold throughout the United States, and an infringement suit based on *use* of the pallets in question could be filed in any one of the eleven judicial circuits.

4. The decision of the Court below as to "obviousness" is not in conflict with the decisions of any other circuits.

Section 103 of the Patent Act of 1952 is not mentioned in the decision below. The application of the standard of invention involving "obviousness" depends upon the particular facts of each individual case, and the Court of Appeals' holding of obviousness here is not "in conflict" with holdings of *non*obviousness in *other* cases involving *other* facts.

In *Lyon* v. *Bausch & Lomb Optical Co.*, 224 F. 2d 530 (2nd Cir. 1955), cert. denied, 350 U. S. 911 (1955), Judge Learned Hand defined the effect of § 103 as "restoring the original gloss, substantially in *ipsissimis verbis*; which has never been overruled; but on the contrary for seventy or eighty years has been regarded as authoritative". This decision declares the law of the Second Circuit, and is cited with approval in the cases relied on by Petitioner in its point 4: *L-O-F Glass Fibers Co.* v. *Watson*, 228 F. 2d 40 (D. C. Cir. 1955); *Palmer* v. *Ludens, Inc.*, 236 F. 2d 496 (3rd Cir. 1956); and *Otto* v. *Koppers Co.*, 246 F. 2d 789 (4th Cir. 1957). After holding that the Tatko pallet did

not fill a long-felt need, the Court below distinguished the present case on its facts from *Lyon* v. *Bausch & Lomb*, supra. Petitioner's three cases are distinguishable for the same reason.

The different result in the present case arising from different facts does not create a question of law worthy of this Court's attention.

3. The decision of the Court of Appeals that the evidence presented in the District Court failed to establish long-felt want is not in conflict with decisions of this Court.

The Court of Appeals realized that a showing of long-felt want, attempts by others to solve the problem without success, etc., were factors to be considered, for it said:

> "We assume that in this case no prior art pallet was shown with terminal slots which could be used for the insertion, by hand, of side walls. The central problem of the case may thus be framed: Did it involve patentable invention to substitute in a pallet for Lilienfeld's hand operated hinged side arms Tatko's slots for the manual insertion of slate side walls as a means to hold the load in place?
>
> "The affirmative answer to this question made below was based in turn upon another conclusion, viz., that the addition of Tatko's slots to the conventional two-tier pallet 'called for more than was obvious to a person having ordinary skill in the slate industry.' And the latter conclusion was apparently based on a finding that 'for a considerable length of time people skilled in the trade worked to devise an effective pallet for the purpose of easily and safely handling flagstone and slate, but this innovation [i. e., the *slotted* pallet]

> escaped them.' But this finding, we think, was an insufficient basis for a conclusion as to what was *obvious* in the industry." (122 U. S. P. Q. at p. 586)

The Court of Appeals did not "brush aside the findings of the District Court", but held that on the *facts* found by the District Court, long-felt want was not present in this case, *supra* p. 2.

After analyzing Tatko's simple advance over the prior art, the Court correctly stated:

> "To make such a simple choice and to embody it in the pallet, called for no skill beyond that of an ordinary mechanic in the slate-pallet art. We think it altogether plain that the patent in suit was lacking in patentable invention." (122 U. S. P. Q. at p. 587)

Conclusion

Basically, Petitioner argues that certiorari should be granted in the present case because some people feel that there is "a new mood", a "lower standard of invention" under the Patent Act of 1952 than under the prior law, and that there is "confusion" as to the present standard of invention. This "new mood" theory is a pure figment of Petitioner's hopeful imagination. The law is as it has been—a trivial advance cannot be patentable. Here, as the Court of Appeals stated in the *Vermont Structural* decision, *supra* p. 3, the patent is "clearly sub-standard."

Furthermore, such questions were not raised or decided in this case, for the Court of Appeals' conclusion of non-patentability was primarily based on the significant fact that "the want (for slate pallets) was not felt until the prevalence of fork-lift trucks *and*

then was promptly filled." (122 U. S. P. Q. at page 587, emphasis ours)

There is absolutely nothing in the record before this Court to justify a large expenditure of its time to review the merits of what is and always has been an ordinary patent dispute. Accordingly, the petition for certiorari should be denied.

Respectfully submitted,

JOHN C. BLAIR
One Atlantic Street
Stamford, Connecticut
Attorney for Respondent

Of Counsel:

BLAIR SPENCER & BUCKLES
ROBERT H. WARE
ROBERT A. CESARI
F. EUGENE DAVIS IV
One Atlantic Street
Stamford, Connecticut

J. MALCOLM WILLIAMS
Poultney, Vermont

November 19, 1959

Affidavit of Service

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss:

WILLIAM J. MEEHAN, being duly sworn, deposes as follows:

This brief was served by mailing three copies thereof today, first class postage prepaid, addressed to J. Preston Swecker, Esq., 923 Washington Building, Washington, D. C., Attorney for Petitioner, in compliance with Rule 33(1) of this Court.

WILLIAM J. MEEHAN

Subscribed and sworn to before me this 19th day of November, 1959.

MARY JANE MARCHESE
Notary Public

[NOTARIAL SEAL]

MARY JANE MARCHESE
Notary Public, State of New York
Qualified in Kings County
No. 24-7708650
Certs. filed with N. Y. Co. Clk.
Commission Expires March 30, 1960

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 491

TATKO BROTHERS SLATE CO., INC., *Petitioner*

v.

MATTHEW HANNON, *Respondent*

REPLY OF PETITIONER TO RESPONDENT'S BRIEF

J. PRESTON SWECKER
923 Washington Building
Washington, D. C.
Attorney for Petitioner

Of Counsel:

WILLIAM C. SENNETT
Bennington, Vermont

MAXWELL E. SPARROW
665 Fifth Avenue
New York, New York

WILLIAM L. MATHIS
923 Washington Building
Washington 5, D. C.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

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v.

MATTHEW HANNON, *Respondent*

REPLY OF PETITIONER TO RESPONDENT'S BRIEF

The Judgment of the Court Below Denied Application of the Doctrine of Lyon v. Bausch & Lomb

Verbally, the Court below paid tribute to the doctrine enunciated in *Lyon* v. *Bausch & Lomb Optical Co.* (C.A. 2), 224 F. (2d) 530, cert. denied 350 U.S. 911. By its ruling, the law as declared with respect to Section 103 of the Patent Act of 1952 by Judge Learned Hand, was distinguished in the present case only on the meager differences in the facts involved. The cases cannot be distinguished on that basis alone without doing violence to the principle of law announced in Lyon v. Bausch & Lomb, or without disregarding

the findings of fact of the District Court as to the particular facts in this case, contrary to the expressed mandate of Rule 52(a) FRCP.

The Respondent's Brief admits (page 8) that the Court of Appeals disregarded Section 103 of the 1952 Patent Act. It should not have been ignored. The 1952 Patent Act was the very basis of the decision in Lyon v. Bausch & Lomb, and this section was the heart of Judge Madden's dissenting opinion in this case. The latter specifically relied upon the terms of Section 103 of the 1952 Act. Since the new Act was so disregarded by the majority opinion below, and since it was the very principle of Judge Learned Hand's opinion in Lyon v. Bausch & Lomb, this gives rise to an admitted conflict with other applicable decisions interpreting Section 103 of the 1952 Act, and its applicability to this case.

Conflict of Decisions of Different Circuits Cannot be Reconciled by Facts Involved

It is rare indeed when two patent cases arise on precisely the same facts. The principles of law involved; and especially the interpretation of Section 103 of the 1952 Act, do not depend upon the facts which distinguish nearly every case, one from another.

Here the District Court predicated its findings of fact on the evidence presented to that Court, and from that evidence, presented in the light of Section 103 of the 1952 Act, as interpreted in Lyon v. Bausch & Lomb, concluded that the patent in suit is valid. The Court of Appeals, in the majority opinion, admittedly without consideration of Section 103 of the 1952 Act, concluded, from its *de novo* review of the facts contrary to the provisions of Rule 52(a) FRCP, that the

patent in suit is invalid. It is on the basis of these same findings of fact that the Court of Appeals asserted a distinction from the decision in Lyon v. Bausch & Lomb.

This holding by the Court of Appeals leaves the case in direct conflict with decisions in other circuits, and with the decision of this Court in *Goodyear Tire & Rubber Co., Inc.* v. *Ray-O-Vac Co.*, 321 U.S. 275 (although the latter was decided prior to the 1952 Act).

The rule of law which is applicable to this situation is that *where there has long been a want in the trade for the particular invention, and others have sought to solve the problem without success, and when the patentee solved it, the trade readily adopted that solution, these circumstances should, at least in a close case, tip the scales in favor of patentability.* These are criteria for patentability within the definition of Section 103 of the 1952 Act. The decision of the Court below failed to give effect to this new "mood", as expressed by Judge Madden in his dissenting opinion.

This principle of law was announced by this Court at least as early as 1909 in *Expanded Metal Co.* v. *Bradford*, 214 U.S. 366, 381. In following the latter case, as distinguished from such more recent decisions as *Cuno Corp.* v. *Automatic Devices Corp.*, 314 U.S. 84, and *A & P Tea Co.* v. *Supermarket Corp.*, 340 U.S. 147, the Court of Appeals for the District of Columbia, in *L-O-F Glass Fibers Co.* v. *Watson*, 228 F. (2d) 40, stated in footnote 14:

> "We may safely assume that the Patent Act of 1952, 35 U.S.C.A. §103, was intended to restore 'the law to what it was when the court announced

the definition of invention.' See discussion by Judge Learned Hand in Lyon v. Bausch & Lomb Optical Co."

To the same effect is the construction of this section in *R. M. Palmer Co.* v. *Ludens, Inc.* (C.A. 3), 236 F. (2d) 496, 111 USPQ 1, 3:

> "In the field of judicial testing of the validity of patents, it is a common observation that the law is settled, the difficulty existing in its application. Here, the plaintiff has introduced an argument as to the effect of the Patent Act of 1952, 35 U.S.C., 1952 ed. Section 1, et seq. The argument presupposes that the courts, as a result of the 'flash of genius' expression in Cuno Engineering Corp. v. Automatic Devices Corp., 314 U.S. 84, 91, 51 USPQ 272, 275 (1941), have applied a higher, more rigid standard for determining validity, and that the recent Act, 35 U.S.C., 1952 ed. Section 103, constitutes a *congressional change of direction* to assertedly more lenient criteria." (Italics added)

The "congressional change of direction" there referred to is the same as the new "mood" as mentioned by Judge Madden, imported by the new Statute.

To the same effect, is the decision in *Otto* v. *Koppers Co.* (C.A. 4), 246 F. (2d) 789. In view of this diversity of interpretation of the Patent Statute, both within and without the Second Circuit, it is important that this Court lay at rest these differences as to its interpretation, and determine whether the Court below properly applied the rules of law prescribed by the new Statute.

Respondent Tacitly Concedes a Conflict Between the Decision Below and This Court's Decision in Goodyear v. Ray-O-Vac

No mention is made of the latter decision in the Respondent's Brief. In Section 5 thereof, there are only quotations from the majority opinion of the Court of Appeals, but those cannot cover up the direct conflict between the decision below and this Court's decision in the Goodyear case.

Admittedly, the Goodyear case, like *Expanded Metal Co.* v. *Bradford*, *supra*, was decided prior to the enactment of the 1952 Patent Act, but the cases referred to above have declared, in interpreting Section 103, that it was intended by Congress to restore the Patent Law to what it was declared to be by this Court in the realm of time of the Bradford and Goodyear cases. If that be the proper interpretation of the new law, then the rule in the Goodyear case ought to be taken into account in deciding the question of patentability here involved.

Conclusion

The uncertainty that has grown up with respect to the effect of the 1952 Patent Act on the determination of patentability of inventions, and the divergence of interpretation of Section 103 thereof, and the applicability thereof in determining questions of patentability, present a problem in this branch of the law that deserves determination by this Court.

Petitioner stands upon its petition and all of the reasons therein relied upon for the allowance of the writ.

Respectfully submitted,

J. Preston Swecker
923 Washington Building
Washington, D. C.
Attorney for Petitioner

Washington, D. C.
December 2, 1959

Of Counsel:

William C. Sennett
Bennington, Vermont

Maxwell E. Sparrow
665 Fifth Avenue
New York, New York

William L. Mathis
923 Washington Building
Washington 5, D. C.